No. 09-712

Supreme Court, U.S.
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In The Supreme Court of the United States

INGRID FELDERHOF,

Petitioner,

v.

JENKENS & GILCHRIST, P.C., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF JENKENS & GILCHRIST, P.C. TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a willful refusal to file an answer after proper service constitutes excusable neglect under FED. R. CIV. P. 60(b)(1).

2. Whether the United States Court of Appeals for the Fifth Circuit correctly applied a "clearly erroneous" standard in reviewing the district court's findings on Petitioner's claim of excusable neglect under FED. R. CIV. P. 60(b)(1).

LIST OF PARTIES

The following list identifies all of the parties appearing here and before the United States Court of Appeals for the Fifth Circuit.

1. Ingrid Felderhof, Petitioner and Appellant below

2. Jenkens & Gilchrist, P.C., Respondent and Appellee below

3. John Felderhof, Respondent and Appellee below

4. Groia & Company, Respondent and Appellee below

CORPORATE DISCLOSURE STATEMENT

Respondent Jenkens & Gilchrist, P.C., is a professional corporation. There are no parent corporations or publicly held companies owning 10% of Respondent's stock.

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Jenkens & Gilchrist v. Groia & Co., 542 F.3d 114 (5th Cir. 2008), *cert. den.*, 129 S.Ct. 1585 (2009), ("*Jenkens I*"). Pet. App. 11. In Petitioner's first appeal of the trial court's denial of her motion to vacate the judgment, the United States Court of Appeals for the Fifth Circuit (hereinafter "Circuit Court") remanded the case for either (1) fact findings on the record or (2) further hearing to develop additional evidence, on the question whether the Petitioner's failure to file an answer after proper service was *willful*. The Circuit Court also found: (1) service of process on Petitioner *did* include the summons (Petitioner's initial basis for seeking vacation of the judgment was that it did not) and (2) Petitioner's Rule 60(b)(4) claim that the judgment was void failed as a matter of law.

Jenkens & Gilchrist v. Groia & Co., et al., Cause No. C.A. H-06-3590 (United States District Court for the Southern District of Texas, Houston Division, Order of October 1, 2008; Pet. App. 3). On remand, the trial court entered a detailed Order making specific findings of willfulness in Petitioner's failure to file an answer.

Jenkens & Gilchrist v. Groia & Co., (unpublished) Cause No. 08-20642 (5th Cir. Aug. 12, 2009, *per curiam*) ("*Jenkens II*"). Pet. App. 1. In Petitioner's second appeal, the Circuit Court affirmed *per curiam*. On September 14, 2009, the Circuit Court denied rehearing. Pet. App. 35.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 12, 2009. Petitioner's Motion for Rehearing was denied on September 14, 2009.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Although Federal Rule of Civil Procedure 60(b)(1) is set out in the petition, Respondent Jenkens & Gilchrist, P.C. sets it out here for ease of reference.

Federal Rule of Civil Procedure 60(b)(1):

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect.

STATEMENT OF FACTS[1]

A. Factual Background

Now and at all material times, Petitioner is and has been an Australian national living in the Cayman Islands. R. 13, 237. Her former husband, John Felderhof, is a Canadian national formerly living in Indonesia (R. 13) and now believed to be living in the Philippine Islands.

In 1997, the Felderhofs hired Jenkens & Gilchrist, P.C. (hereinafter "Jenkens") to represent them in U.S. regulatory, criminal and civil claims arising from the bankruptcy of John Felderhof's employer, Bre-X Minerals Ltd., a Canadian company. R. 14, 30-33, 237. At the same time, they hired the Heenan Blaikie law firm in Toronto to represent them in similar Canadian proceedings. R. 14.

In May 1997, the Felderhofs executed a modified retainer agreement in which they promised to pay Jenkens an earned and nonrefundable retainer of $1 million in addition to hourly fees. R. 45-53. They made a parallel agreement with Heenan Blaikie. R. 162 and Groia briefs in Fifth Circuit. Jenkens represented the Felderhofs in various courts throughout the protracted U.S. proceedings. Petitioner disputes the applicability of the Heenan Blaikie agreement to her, as she apparently did not sign the Canadian

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[1] Record references are to the record of the U.S. Court of Appeals for the Fifth Circuit per SUP. CT. R. 12(7).

agreement (R. 162), but she makes no such contention as to Jenkens. Petitioner's quarrel with Heenan Blaikie and its successor, Groia & Company ("Groia"), is not the subject of this dispute.

In partial payment of the retainer, Jenkens accepted the Felderhofs' interest in Travis Close, a closely held investment vehicle whose sole asset was a residential property (but not Petitioner's residence) near Williamsburg, Virginia. R. 15, 35-38. Jenkens reported as income and paid taxes on one-half its appraised value (approximately $360,000.00) (R. 24-25), the other half being attributable to Heenan Blaikie consistent with the parallel agreements between the Felderhofs and the two law firms.

During the next nine years, Jenkens listed the property for sale, leased it, paid taxes, repairs and utilities on it, and exercised all the rights and obligations of ownership without question or complaint by Petitioner. R. 24-25. Jenkens also accepted, sold and divided with Heenan Blaikie the proceeds of sale of a Lamborghini automobile under this same agreement, again without contest or complaint by Petitioner. R. 187.

In October 2001, Petitioner secured a Dominican Republic divorce from John Felderhof.[2]

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[2] Although not in the formal record, this divorce is not disputed, and both parties have referred to it throughout these proceedings. In fact, Petitioner relies on it in her dispute with Groia. *See* Petitioner's brief in 07-20296 in the U.S. Court of Appeals for the Fifth Circuit.

On October 1, 2003, Jenkens' representation of Petitioner ended. Appellee's Brief in Fifth Circuit, p. 11.

In September 2006, nine years after the transfer and nearly three years after Jenkens' representation of Petitioner had ended, Petitioner demanded "return" of the Travis Close property. R. 215-216. She claimed for the first time, and despite explicit language to the contrary in the modified retainer agreement, that it had been security for other fees and not a fee itself. *Id.*

Jenkens disputed Petitioner's claim and attempted to resolve the dispute which involved not only Petitioner, but also Groia and Petitioner's former husband, John Felderhof. R. 24-25, 193-195, 217.

Petitioner rejected anything but unconditional transfer to her with no provision for John Felderhof, or the unpaid fees to Groia, as successor to Heenan Blaikie. R. 189, 191-192, Tab A of Appellant's Fifth Circuit Brief.

Beginning in late October 2006, Petitioner refused to accept any communication from Jenkens by which her receipt could be verified. R. 297, 319. She rejected FedEx deliveries and facsimiles. R. 297-298, 319, 322. She instructed the law firm representing her at the time not to accept, forward or respond to any further communications from Jenkens *but to destroy them*. R. 278-279. Consistent with that, Jenkens' request for the new contact information for her lawyer (who had changed offices) went

unanswered. *Id.* Faced with that intransigence, Jenkens filed an interpleader/declaratory judgment suit naming Petitioner, her former husband, and Groia as defendants on November 14, 2006. R. 12-64.

B. Course of Proceedings Below

Jenkens filed its interpleader/declaratory judgment suit in the U.S. District Court for the Southern District of Texas on November 14, 2006. Groia and Petitioner's former husband, John Felderhof, waived service and entered an appearance in the suit. R. 74-78, 88-92.

Petitioner was personally served in the Cayman Islands on November 16, 2006. R. 107, 273, 370-371. Jenkens also sought service under the Hague Convention, but Petitioner "willfully avoided" that service. R. 303-304. The November 16 service included an Order for Conference and Disclosure of Interested Parties (R. 66), and a second copy of that Order was served on her about two weeks later. R. 189-190. Among other things, that Order directed Petitioner to file a certificate of persons or entities with a financial interest within fifteen days. R. 66. She never filed the certificate or an answer. *Id.*

The court entered a default order on January 5, 2007 (R. 125) and pursuant to agreement of the parties who did answer, an agreed judgment on January 9, 2007. R. 139-140. The judgment awarded the property to Jenkens but anticipated sale and

awarded half the net proceeds of the sale to Groia, consistent with the 1997 agreements. *Id.*

Although she learned of the judgment the day after it was filed (Pet. p. 11), Petitioner did not file a motion for new trial under FED. R. CIV. P. 59 or a timely appeal pursuant to FED. R. APP. P. 4 but an out-of-time motion to vacate the judgment under FED. R. CIV. P. 60(b)(1) and 60(b)(4). R. 145-230. In her motion, she admitted receiving the service but claimed it did not include a summons so that she did not know and could not know an answer was due. *Id.*

On April 2, 2007, after a thorough briefing by all parties, the trial court denied Petitioner's motion to vacate. R. 421-422.

On August 28, 2008, the U.S. Court of Appeals for the Fifth Circuit affirmed the denial of relief under FED. R. CIV. P. 60(b)(4) and held that the service *did* include the summons as a *matter of law* but remanded the case for the limited purpose of more detailed findings on the willfulness of Petitioner in failing to answer (*Jenkens I*). Pet. App. 11.

On October 1, 2008, the trial court issued its detailed order explicitly finding Petitioner's failure to answer was willful. Pet. App. 3.

On August 12, 2009, the Circuit Court affirmed *per curiam* (Pet. App. 1) applying a "clearly erroneous" abuse of discretion standard of review (*Jenkens II*). On September 14, 2009, the Circuit Court denied rehearing. Pet. App. 35.

C. Objections to Petitioner's Statements of Fact

Pursuant to Supreme Court Rule 15, Jenkens notes the following misstatements of fact in Petitioner's petition. (For the sake of brevity, the misstatements are paraphrased.)

Willfulness:

1. *Petitioner did not act willfully in failing to answer the complaint.* Pet. p. 6. The trial court found willfulness, and the Circuit Court affirmed that finding applying a clear error/abuse of discretion standard of review. Pet. App. 3, 11.

The Retainer Agreement:

2. *Petitioner's husband alone hired Jenkens to represent him.* Pet. p. 2. Both Petitioner and her husband hired Jenkens, both signed the modified retainer agreement, and the firm acted for both throughout its representation. R. 30-33, 237.

3. *The Williamsburg property was Petitioner's residence.* Pet. pp. 2, 6. The property was not Petitioner's residence and in fact, when she demanded its "return" in 2006, she asked Jenkens to facilitate its sale and transfer the sale proceeds to her for purchase of a Cayman Island property for her son. R. 215-216.

4. *The transfer of Travis Close and its sole asset, the Williamsburg, Virginia property, was to secure payment of future fees rather than a fee itself.* Pet. p. 2.

The modified retainer agreement specifically provided that this was a nonrefundable, earned retainer *in addition to* hourly fees. R. 49-54.

5. *Jenkens instructed Petitioner to transfer Travis Close.* Pet. p. 2. Neither Travis Close nor any specific property was mentioned in the modified retainer agreement. R. 49-54. It was just one of two properties (the other being a Lamborghini automobile, R. 263) the Felderhofs transferred in payment of this obligation.

6. *Jenkens promised to return the property.* Pet. p. 2. The modified retainer agreement makes clear the fee was nonrefundable, and the transfer was unconditional. R. 49-54. Anything less would not have been acceptable to Jenkens, and it would have been a fraud on the Felderhofs' numerous creditors, the regulatory authorities, and the Canadian bankruptcy court, which still claims any portion of the sale proceeds not going to Jenkens or Groia.

7. (Implied) *The Petitioner's demand for "return" of the Travis Close property came immediately after Jenkens' representation of Petitioner had ended* (Pet. p. 2). Jenkens' representation of Petitioner ended in October 2003. The demand did not come until September 2006. R. 215-216.

***Service of Process*:**

8. *The service of process did not include a summons.* Pet. p. 3. The trial court found and the Circuit Court affirmed that the record showed service included the

summons as a *matter of law*. Pet. App. 11; R. 107, 273, 275-276, 370-371.

9. (Omission) Petitioner failed to file the certificate of interested persons required by the Order of Conference with which she admits being served. Pet. App. 5.

10. (Omission) The Grand Court of the Cayman Islands certified that Petitioner "willfully avoided service" under the Hague Convention at her two Cayman residences. R. 303-304.

***Notices and Communications*:**

11. *The Cayman postal service did not deliver the various notices and communications because they were addressed to a physical address rather than a P.O. Box.* Pet. p. 4. This argument was raised for the first time in Petitioner's second appeal to the Circuit Court, long after the record had been closed. Her briefing in the trial court blamed her failure to receive such notices on a private gate guard in her gated community. R. 350. It is the same address she used in her Dominican Republic divorce, the same address at which she *refused* FedEx deliveries – which require a physical address – and the same address at which she received other communications.

12. *Jenkens "waited until" December 27 to send notice of the January 5 default hearing.* Pet. p. 4. That is not the date Jenkens sent it but the date it was mailed from the Cayman law firm Jenkens had

hired to insure compliance with Cayman law. R. 288-289.

***The Judgment*:**

13. *The judgment was a default judgment.* Pet. p. 5. While Petitioner defaulted, the judgment was a summary judgment agreed to by the parties who *had* entered an appearance. R. 139-140. The question before the Fifth Circuit was not the merits of the judgment but of the denial of the out-of-time Rule 60 motion to vacate. *See* Fifth Circuit's Order of June 19, 2007; FED. R. APP. P. 4(a)(4)(A)(vi); FED. R. CIV. P. 60(b); *Browder v. Director, Dep't of Corrections of Illinois,* 434 U.S. 257 (1978); *Cacevic v. City of Hazel Park*, 226 F.3d 483 (6th Cir. 2000); 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §§ 2871, 2872 (1995); 9 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 3950.4 (1995).

14. (Implied) *Petitioner acted immediately on receipt of notice of the judgment.* Pet. p. 6. Petitioner learned of the judgment on January 11, 2007, the day after it was filed. She did not file a timely motion for new trial (FED. R. CIV. P. 59) or notice of appeal. FED. R. APP. P. 4. She did not file her Rule 60 motion until February 23, 2007, forty-four days later. R. 145.

***The District Court's Order*:**

15. *In its October 1, 2008 order, the district court declined to consider any factor other than Petitioner's*

willfulness in failing to answer. Pet. p. 7. That was the only question on which the case was remanded for the district court to consider. Pet. App. 31.

SUMMARY OF THE ARGUMENT

Although duly served, Petitioner failed to answer or make other appearance in this interpleader/declaratory judgment case.[3] She also failed to file a certificate of interested parties pursuant to an Order of Conference which she admits receiving. The trial court entered an order of default as to her, and five days later, entered a judgment agreed to by the parties who did answer. Although Petitioner learned of the judgment the next day, she did not file a motion for new trial (FED. R. CIV. P. 59) or a notice of appeal (FED. R. APP. P. 4), but forty-four days later, an out-of-time Rule 60 motion to vacate. After comprehensive briefing, the court denied that motion.

The Circuit Court affirmed in part but remanded for the limited purpose of determining whether Petitioner's failure to file answer was willful. In a second order, the district court made detailed findings of willfulness. The Circuit Court affirmed *per curiam*.

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[3] Although Petitioner "willfully avoided service" under the Hague Convention, valid personal service was obtained under Cayman and U.S. law. R. 282-283.

The Circuit Court applied the correct standard in its review of this Rule 60(b)(1) excusable neglect case.

ARGUMENT AND AUTHORITIES

Petitioner argues that the Circuit Court applied the wrong standard in this Rule 60(b)(1) case and secondarily alleges a conflict among the circuits. On the first point, Petitioner argues that the lower courts failed to apply the standards set out in *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). Petitioner's attempt fails for three reasons: (1) it incorrectly suggests the lower courts did not consider the *Pioneer* factors; (2) it fails to recognize the critical importance of culpability to the concept of excusable neglect; and (3) it presents as fact what is actually just argument.

A. The *Pioneer* Factors

Contrary to Petitioner's statement at page 8 of her petition, the Circuit Court did not *deem* the *Pioneer* factors inapplicable. Perhaps the reason the Circuit Court did not mention *Pioneer* specifically is because Petitioner did not cite it in her brief there. *See* Petitioner's briefs in Fifth Circuit Cause No. 08-20642.

Pioneer announces that whether neglect is excusable for Rule 60(b)(1) purposes is essentially an

equitable inquiry. 507 U.S. at 395. The Court cites with approval the factors that had been considered by the Sixth Circuit: the danger of prejudice to the debtor; the length of the delay and its potential impact on judicial proceedings; the reason for the delay, including whether it was within the reasonable control of the movant; and whether the movant acted in good faith. 507 U.S. at 395. Petitioner faults the Circuit Court here for supposedly not considering "all" circumstances (she does not say which it did not consider) when it gave special weight to the willfulness of Petitioner's default.

It is unclear whether Petitioner makes a substantive (the court could not consider willfulness since it is not included in *Pioneer's* list) or a procedural (the Circuit Court failed to address the *Pioneer* factors) complaint, but neither has merit.

First, it is unclear whether *Pioneer* applies, at least the part of *Pioneer* Petitioner relies on. Before getting to the *excusable* part of the analysis, *Pioneer* announces that Rule 60(b)(1) requires *neglect*. 507 U.S. at 394, 395. A willful failure is by definition not neglect. *Id.*; *Cacevic v. City of Hazel Park*, 226 F.3d 483 (6th Cir. 2000).

Second, *Pioneer* did not involve any suggestion of a willful failure to answer. The client in *Pioneer* had specifically asked the lawyer about filing deadlines, and the lawyer had inadvertently failed to docket the deadline properly. *Pioneer* therefore involved a negligent failure to answer rather than an intentional

act. Under those specific circumstances, the defendant's failure to timely answer was excused. Neither *Pioneer* nor any other case suggests a *willful* failure would have produced the same result.

More important, the Circuit Court did consider the *Pioneer* factors. One cannot review the Circuit Court's detailed opinion in *Jenkens I* (Pet. App. 11) and conclude otherwise. The only consideration the Circuit Court was not able to resolve in the first appeal was the factor not involved in *Pioneer*: whether Petitioner's failure to file an answer was willful. That was the sole issue on which the Circuit Court remanded the case to the district court, and as shown in more detail below, once that issue was decided, *excusable* neglect did not exist.[4] Significantly, Petitioner made no complaint that the Circuit Court had not followed *Pioneer*[5] in her petition for writ of certiorari from *that* earlier decision (*Jenkens I*).

The Supreme Court in *Pioneer* did make two rulings that do apply to this case:

(1) The court refused to "unsettle any factual findings entered by the bankruptcy court and affirmed by the district court and the court of appeals." 507 U.S. 380, at 397. (*See* p. 12 infra.)

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[4] Again, assuming *neglect* existed at all.

[5] Petition for Writ of Certiorari No. 08-0842 filed December 23, 2008, denied March 9, 2009.

(2) The court confirmed that a party is bound by the acts of its attorneys, even if prejudicial to the client's interests. 507 U.S. 380, at 396, 397. (Petitioner has been represented by her Cayman counsel, Chapman, throughout this case but particularly at the time of service, avoidance of Hague service, and failure to answer or otherwise respond.)

The three cases cited by Petitioner[6] as supposedly showing a conflict between this decision and *Pioneer* and between the Fifth Circuit and other circuits merely show the not-surprising fact that different facts produce different results in different courts. None suggests that a willful refusal to file an answer can constitute excusable neglect. None supports Petitioner's assertion that the *Pioneer* considerations "go well beyond" whether a *willfully* defaulting party acted with or without good faith. Pet. p. 11. In fact, the authority is to the contrary (*see* 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §§ 60.22, 60.41 (3d ed. 2009)). Even good faith will not salvage a willful failure to file an answer. *Gucci American, Inc. v. Gold Center Jewelry*, 158 F.3d 631 (2d Cir. 1998), *cert. den.*, 525 U.S. 1106 (1999).

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[6] *Lemoge v. United States*, 587 F.3d 1188 (9th Cir. 2009); *Feeney v. AT&E, Inc.*, 472 F.3d 560 (8th Cir. 2006); *Union Pacific Railroad Co. v. Progress Rail Services Corp.*, 256 F.3d 781 (8th Cir. 2001).

B. Culpable/Willful/Intentional Failure

Petitioner fails to recognize the crucial part culpability, the difference between intentional and unintentional conduct, plays in Rule 60(b)(1) cases. Neither *Pioneer* nor any other case suggests that a party's willful failure to answer will be excused by other equitable considerations.

> "[D]eliberate or willful conduct on the part of the person seeking relief from the judgment precludes, by its very nature, the finding of 'mistake' or 'inadvertence' or 'excusable neglect'."

See 12 MOORE'S FEDERAL PRACTICE, § 60.41[1][c][i]. If intentional or willful, the failure to answer is neither excusable nor neglect.

C. Narrowness of District Court's Analysis

Part B of the petition complains that the district court's analysis was too narrow because it focused on willfulness alone. Pet. p. 14. The "willfulness" finding was the only point on which the case was remanded. *See Jenkens I*, Pet. App. 11. The district court's focus on that point was not an "impermissibly narrow analysis" but exactly what the Circuit Court had required. The Circuit Court had already conducted a thorough analysis of the record with regard to the other *Pioneer* factors in *Jenkens I* and was not required to repeat that process in reviewing the trial court's findings on remand.

D. Conflict Among the Circuits

There is no conflict or split among the circuits regarding the proper standard. In point of fact, the circuits have adopted – with remarkable uniformity – a three-pronged test for evaluating defaults and default judgments under *Pioneer*: (1) prejudice to the non-movant; (2) meritorious defense of movant; and (3) culpability. *See Burrell v. Henderson*, 434 F.3d 826, 832 (6th Cir. 2006); 12 MOORE'S FEDERAL PRACTICE, § 60.22[3][b]. The fact that the courts organize the equitable factors set out in *Pioneer* in a different, more descriptive format does not mean they do not follow *Pioneer*. The third prong of the three-prong analysis (culpability) naturally encompasses the *reason for the delay*, *control of the movant* and *good faith* elements noted in *Pioneer*. There is no conflict among the circuits.

In short, the record shows full compliance with *Pioneer* and its requirement of an equitable analysis of the failure to answer.

E. The Trial Court's Findings

Lastly, Petitioner renews her attack on the trial court's findings themselves. Pet. pp. 15-19. But Petitioner's "facts" are actually just Petitioner's continuing argument concerning them. Some of the facts found by the district court, such as that Petitioner was actually aware of the summons (Pet. p. 17), are virtually compelled by the Circuit Court's finding that the initial service had included the summons *as a*

matter of law. Any other result would allow a party to avoid the effect of summons (to file an answer or make other appearance) with the simple expediency of denying the party was aware of it. Others, such as that Petitioner had instructed her lawyers not to respond to Jenkens but to destroy any communications from them, are shown in the communications from the lawyers themselves. R. 278-279. Without attempting to reargue each finding attacked by Petitioner (Pet. pp. 15-19), suffice it to say all are supported by the record, and the following ones – about which there can be no real dispute – would by themselves support the finding of *willfulness* in Petitioner's failure to answer:

- Petitioner was properly served;
- despite service, Petitioner did not file an answer or otherwise respond;
- Petitioner was served with the Order of Conference and Disclosure of Interested Parties;
- despite such service, Petitioner did not file a certificate of interested parties;
- Petitioner was sent notice of the default hearing;
- Petitioner did not attend the hearing;
- Petitioner refused to communicate with Jenkens in October 2006;

- Petitioner instructed her lawyers not to acknowledge or accept any communications from Jenkens but to destroy them;
- the same lawyers were not allowed to provide Jenkens with contact information for her "new" lawyer.

In short, Petitioner's fact-finding complaints (Pet. pp. 15-19) are contentions, not facts, and are not proper subjects for this Court's review. SUP. CT. R. 10; *Pioneer*, 507 U.S. at 397.

CONCLUSION

Far from seeking adherence to standards set by this Court or clarification of conflicting circuit opinions, Petitioner invites this Court to unfind facts found by the district court and to carve out a special exception for her from Rule 60(b)(1)'s requirement of *excusable* neglect.

Jenkens has no quarrel with the proposition that excusable neglect is an equitable concept and assumes the courts below agree. But the equities here do not favor Petitioner, and the finding of willfulness is supported – virtually compelled – by the record. The Circuit Court correctly found no abuse of the trial court's discretion. The correct standard of review was

applied and there is no split among the circuits. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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